IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1719

LAMAR LIFE BROADCASTING COMPANY,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, CHANNEL 3, INC., CIVIC COMMUNICATIONS CORP., COMMUNICATIONS IMPROVEMENT, INC., DIXIE NATIONAL BROADCASTING CORP., JACKSON TELEVISION, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

The Government relies heavily upon the contention that "a final decision was reached on petitioner's renewal application almost two years ago by the court of appeals . . ." (Gov. Br. 9); that Petitioner's ". . . renewal application is no longer under consideration" (Gov. Br. 10); and that Petitioner is ". . . no longer in the role of the typical renewal applicant . . ." (Gov. Br. 11). It then begs the question by asserting that Petitioner's argument that the Commission has treated its renewal application as pending is of no avail since Petitioner's renewal is pending only in a "technical" sense. (Gov. Br. 12).

The argument of the Government ignores the basic thrust of Petitioner's (Lamar's) plea for review and the clear ruling of the Court of Appeals as to the nature of its action on Lamar's renewal application. The Court of Appeals cannot act as a "super Commission". It cannot deny a renewal application or direct its denial. Its power is limited to affirming or vacating the agency's action and remanding the matter to the agency for ultimate disposition of the application. *FRC* v. *Nelson Bros. Co.*, 289 U.S. 266, 274-78 (1933); *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946); *American Broadcasting-Paramount Theatres, Inc.* v. *FCC*, 120 U.S. App.D.C. 264, 270, 345 F.2d 954, 960 (1965), *cert. denied*, 383 U.S. 906 (1966).

The decision of the Court of Appeals rendered on June 20, 1969,[1] *appeared* to deny or direct denial of Lamar's renewal application contrary to the authorities above cited. Both the Commission and Lamar brought this to the Court's attention by petitions for rehearing. In ruling on those petitions, the two-judge panel of the court below issued a "Statement" (App. to Petition for a Writ of Certiorari, p. 40), in which it purported to lay this point to rest:

> "The Commission professes concern that the court has improperly arrogated to itself a decision which assertedly is committed only to the Commission, namely, the denial of the license renewal application because the licensee is not qualified under any circumstances, in terms of the public interest, to have the channel. *Had that been the division's purpose, it would not have contemplated that the licensee could be one of the competing applicants.* What was held

[1] Office of Communication of United Church of Christ v. FCC, 138 U.S.App.D.C. 112, 425 F.2d 543 (1969), rehearing denied *en banc*, 138 U.S.App.D.C. 120, 425 F.2d 550 (1969).

was that the proceedings on remand had been hopelessly bungled and that *the public interest was best served by taking note of the early expiration date* and getting on with a new hearing in which the Commission can decide who is best qualified to have this channel.*" (Emphasis supplied)

"* The license grant under review terminates June 1, 1970, and *proceedings to determine who should be the licensee for the term beginning on that date would have to get under way in ample time before that.*" (Emphasis supplied)

Thus, the Court of Appeals made it clear that it was not denying Lamar's renewal application or directing its denial but rather contemplated an *expedited* hearing upon Lamar's application and upon other applications which should get underway "in ample time before" the then current renewal period would expire, to-wit, before June 1, 1970. The Commission's action granting Lamar's renewal application was to be vacated which thereby would restore that application to pending status to be treated with in the new hearing. As indicated in Lamar's Petition for Writ of Certiorari (p. 5 and fn. 10), Lamar did not seek certiorari at that time because the Court's September 5, 1969, Statement made it clear that Lamar's renewal application was not denied and that its right to operate under Section 307(d) of the Communications Act, 47 USC §307(d), would be recognized—at least for the short time contemplated by the court below during which an expedited hearing would be held.

Instead, the Commission delayed the vacating of its action until December 5, 1969, and did not designate the new applications for hearing until May 4, 1970, with the first pre-trial conference to be held in June, 1970,—*after* the termination of the renewal period on June 1, 1970.

When the Commission designated the new applications for hearing, it expressly recognized the pendency of Lamar's renewal application. Its May 4, 1970 Order, *Lamar Life Broadcasting Co.*, 25 FCC 2d 101 (1970), stated, in part, as follows:

> ". . . we wish to make clear that Lamar will be judged on its basic [new] application (BPCT-4320). The grant or denial of the *pending renewal application* (BRCT-326) for station WLBT(TV) will rest on the determination made with respect to BPCT-4320." [Emphasis and bracketed material supplied.]

Thus, the entire premise of the Government's position—that Lamar is no longer a pending renewal applicant—has been rejected by the clear language of the Court of Appeals and of the Commission itself. Accordingly, the mandates of two statutes, Section 307(d) of the Communications Act, 47 USC §307(d), and Section 9(b) of the Administrative Procedure Act, 5 USC §558(c), guarantee to Lamar the right to operate until its pending renewal application receives final disposition by the agency—an act which has not yet occurred.[1]

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[1] The Government's contention (Gov. Br. 12, fn. 10) that the Commission cannot be faulted for its May 21, 1971 Order implementing its earlier Order designating CII as interim operator misconceives the point of Lamar's Supplemental Brief to this Court. The question is not whether the Commission was prevented from acting by stay but rather whether its action was an unlawful implementation of its prior Order. The Commission could not, as its May 21, 1971 Order purports to do, lawfully *direct* Lamar to operate WLBT in CII's behalf from April 17, 1971 to June 14, 1971, using Lamar's own capital, equipment and staff, and to turn over the profits for such period to CII, with no recompense whatsoever from CII. The May 21, 1971 directive clearly deprives Lamar of its property contrary to law.

In order to avoid the clear protective language of these statutes, the Government is forced to fashion the thesis that Lamar is no longer a renewal applicant and that the Court ". . . terminated the license renewal aspect of the proceedings . . ." (Gov. Br. 9). But to reach this result the Government necessarily must take the position that the Court of Appeals either denied or directed the denial of the renewal application—an act clearly beyond the Court's power. (*FRC* v. *Nelson Bros. Co.,* and other authorities cited *supra,* p. 2). If the decision of the Court of Appeals here on review stands for the proposition that consideration of Lamar's renewal application has been terminated, the Court's action constitutes an unlawful denial of that application.

CONCLUSION

The writ should be granted for the reasons stated in the Petition, in Petitioner's Supplemental Brief, and in this Reply Brief.

Respectfully submitted,

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